the same "as soon as space are *(sic)* available." It was not surprising that in the circumstances the respondents were bound to store the clay which were then ready for delivery in their godown and charged 10 cents per ton per day as storage fee since they had to pay rental for their use of the godown. We cannot see any reasonable ground for depriving the respondents from obtaining the storage fees as proven and accepted by the learned Judge. We confirm this Order accordingly.

The last ground relates to costs. The respondents'/plaintiffs' claim against the first defendant was dismissed by the trial Judge who ordered the appellants (second defendant in the Court below) to pay the costs. In our view, the costs in relation to the first defendant should be paid by the respondents/plaintiffs since they were unsuccessful in their claim against the first defendant. We order accordingly.

We dismiss the appeal with costs to be paid by the appellants to the respondents.

Deposit to respondents on account of taxed costs.

*Appeal dismissed*

Solicitors: *Skrine & Co.; Shearn Delamore & Co.*

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## TEOH KIM SENG v. HASSAN BIN MOHAMED & ANOR.

**[S.C. (Abdul Hamid C.J. (Malaya), Lee Hun Hoe C.J. (Borneo) & Hashim Yeop A. Sani S.C.J.) December 10, 1986 & January 27, 1987]**

**[Kuala Lumpur – Supreme Court Civil Appeal No. 323 of 1986]**

*Tort – Negligence – Deceased killed in running down case – Deceased 12 years old at time of accident – Damages for loss of expectation of life – Damages for lost years – Civil Law Act, 1956, s. 8(2)(c).*

*Damages – Fatal accident – 12 years old child – Loss of expectation of life.*

In this case the deceased who was killed in a running down case was 12 years old at the time of the accident. The learned trial judge made the following award of damages –

| | |
|---|---|
| Special damages as agreed | $1,500.00 |
| Damages for loss of expectation of life | $4,000.00 |
| Damages for loss of earning in the lost years under s.8(2)(c) | $14,954.65 |

The evidence showed that the deceased used occasionally to assist his father selling fish at an unlicensed stall in the market and was given $32.00 a month, which the father admitted was for pocket expenses. The appellant appealed.

**Held:** (1) the award for loss of expectation of life should be increased to $6,000.00 which would be a more reasonable figure;

(2) in this case there was in fact no material on which a proper assessment could be made for earnings during the lost years and therefore the appeal against the item of damages for such loss of earnings should be allowed.

*Cases referred to:*

(1) *Lee Sai Cheong* v. *Wan Lim Cheong* [1962] M.L.J. 259.
(2) *Benham* v. *Gambling* [1941] A.C. 157.
(3) *Gammell* v. *Wilson; Furness* v. *B.S. Massey Ltd.* [1981] 1 All E.R. 578.
(4) *Abdul Malek bin Hassan* v. *Mohamed Hihwan bin Mastuki & Anor.* [1987] 1 M.L.J.
(5) *Pickett* v. *British Railway Engineering* [1979] 1 All E.R. 774.

SUPREME COURT.

*Manjit Singh* for the appellant.
*Brijnandan Singh Bhar* for the respondent.

*Cur. Adv. Vult.*

**Hashim Yeop A. Sani S.C.J.** (delivering the Judgment of the Court): This is a running down case. The deceased was 12 years at the time of accident. The learned judge made the following award of damages:

| | |
|---|---|
| "Special damages as agreed | $1,500.00 |
| Damages for loss of expectation of life | 4,000.00 |
| Damages for loss of earning in the lost years under section 8(2)(c) | 14,954.65" |

The Civil Law Act was amended in 1984 and the amendment to section 8 of the Act excluded from the application of that section damages for bereavement under the dependency claim, damages for loss of expectation of life and damages for loss of earnings in respect of any period after the person's death. Since the deceased died in 1981 the amendment does not apply to this case.

In the instant case evidence disclosed that the deceased used to assist the father selling fish at an unlicensed stall outside the central market in Alor Setar during school holidays and during weekends. The father said that he paid the deceased $32/– per month. But the learned judge also accepted the

other part of the father's evidence and said in his judgment as follows:

"In fact the assistance was redundant so to speak. The more important thing to note is that the sum of $32.00 per month given by the first plaintiff to the deceased was not for the assistance rendered by him but for his pocket expenses as admitted by the first plaintiff under cross-examination."

Then the learned judge cited *Lee Sai Cheong* v. *Wan Lim Cheong*[1] as a case "on all fours" with the instant case. The learned judge assessed $180/- per month as a reasonable sum as income of the deceased and deducted $80/- thereby leaving $100/- as monthly saving (page 21). Using a multiplier of 20 years the learned judge then made an award of $14,954.65 as damages under section 8(2)(c) of the Civil Law Act. A narrow point is taken on this appeal, that is, whether the learned judge was correct in law in making the award for the "lost years."

In *Lee Sai Cheong* the damages awarded by the trial judge were –

| | |
|---|---|
| "Special damages | $783.00 |
| Damages for loss of expectation of life | $5,000.00 |
| Damages for loss of services | Nil" |

The trial judge in *Lee Sai Cheong* relied on *Benham* v. *Gambling*[2] especially that part of the speech of Viscount Simon on the fixing of reasonable figure and his conclusion that in assessing damages under this head whether in the case of a child or an adult "very moderate figures" should be chosen. The Federal Court dismissed the appeal.

The learned judge in our case relied on *Lee Sai Cheong* but made an award of $4,000/- for loss of expectation of life. We are of the view that $6,000/- would be a more reasonable figure for this item.

In *Gammel* v. *Wilson and Furness* v. *B & S Massey Ltd.*[3] Lord Diplock when dealing with section 1(2)(c) of the Law Reform (Miscellaneous Provisions) Act 1934 which is *in pari materia* with section 8(2)(c) of our Civil Law Act said at page 581:–

"Where the deceased is as young as in these two cases (15 and 22 years respectively) the law requires the judge to indulge in what can be no better than the merest speculation about what might have happened to the deceased during a normal working lifespan if he had not been prematurely killed."

His Lordship also noted that the logic of compensatory basis for loss of expectation of life vanished with the decision in *Benham* v. *Gambling*.

As regards the claim for loss of earnings during the "lost years" the principle to be followed by this court was enunciated in *Abdul Malek bin Hassan's*[4] case. There the trial judge had dismissed the claim for the "lost years" on the grounds that in his view since the deceased being a schoolboy (17½ years old) and not having earned any income at all the judge felt that the claim for the "lost years" in the circumstances would be misconceived. The trial judge considered *Pickett* v. *British Rail Engineering Ltd.*[5] and also *Gammel* v. *Wilson*. In *Abdul Malek* this court ruled that unless the plaintiff can adduce evidence to satisfy the court that at the date of the death of the deceased there was some material on which an assessment can properly be made the judge should refrain from entering into speculation or guess-work in assessing the deceased's estimated loss of future earnings in respect of the "lost years." This is in line with what Lord Scarman said in *Gammel* that the judge must make the best estimate based on the *known facts* and his prospects at the time of death.

In *Pickett* the widow appealed to the House of Lords against the court's refusal to give an award. Lord Salmon in his speech said at page 153:

"Damages for the loss of earnings during the 'lost years' should be assessed justly and with moderation. There can be no question of these damages being fixed at any conventional figure because damages for pecuniary loss, unlike damages for pain and suffering, can be naturally measured in money. The amount awarded will depend upon the facts of each particular case. They may vary greatly from case to case. At one end of the scale, the claim may be made on behalf of a young child or his estate. In such a case, the lost earnings are so unpredictable and speculative that only a minimal sum could properly be awarded. At the other end of the scale, the claim may be made by a man in the prime of life or, if he dies, on behalf of his estate; if he has been in good employment for years with every prospect of continuing to earn a good living until he reaches the age of retirement, after all the relevant factors have been taken into account, the damages recoverable from the defendant are likely to be substantial."

In the present case there was in our view in fact no material on which a proper assessment could be made. In *Gammel* the deceased was 15 years old at the time of accident. Lord Scarman said at page 593:

"If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of

probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award, should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have a claim; it would depend on the evidence."

In the instant case apart from the evidence that the deceased assisted the father at his fish stall there is no other evidence which can form as material for a reasonable assessment. No doubt the court is allowed to speculate to some extent but not just to have a figure "plucked from the air" (to use the words of counsel for the appellant here) without having some material on which to make the assessment. In this case the learned judge arrived at a figure of $180/- per month as his assessment of the probable income of the deceased. We feel that that figure was not based on any material put before him.

We are of the view that the appeal against this item of the damages should accordingly be allowed with costs. Order accordingly.

*Order accordingly.*

Solicitors: *Sri Ram, Zulkifly & Kumar; Brijnandan Singh Bhar & Co.*

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## GOLAM HASSAN BIN MUHAMAD v. SUSILA & ANOR.

**[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C.JJ.) February 25, 1986 & February 3, 1987]**

**[Kuala Lumpur – Supreme Court Civil Appeal No. 102 of 1985]**

*Tort – Road accident – Death of victim – Whether deceased died as a result of injuries suffered as result of accident – Damages for pain and suffering – Damages for dependants – Whether damages for pain and suffering should be taken into account in assessing damages for dependants – Civil Law Act, 1956, ss. 7 & 8.*

*Damages – Fatal accident – Damages for pain, suffering and for dependants.*

In this case one Subramaniam was riding a motorcycle on August 5, 1977 when it collided with a car driven by the appellant, as a result of which he suffered injuries. Subramanian filed a claim for damages against the appellant but subsequently he died on March 23, 1980. The action was continued by his widow and another person substituted as plaintiffs and the claim brought under sections 7 and 8 of the Civil Law Act, 1956. At the trial the learned trial judge gave judgment in the sum of $1,850 as special damages, in the sum of $20,000 as damages for pain and suffering and in another sum of $32,000 as damages for the family of the deceased pursuant to section 7 of the Civil Law Act, 1956. The appellant appealed, the main grounds of appeal being:

a) The learned Judge erred in holding that the deceased died as the result of the injuries which he suffered as the result of the collision;

b) The learned Judge should have treated the two items of damages as being merged. In other words in giving the damages under section 7 the learned Judge should have taken into account the damages which were assessed in respect of pain and suffering.

Expert evidence was called at the trial and the learned trial judge accepted the evidence of an expert that the deceased died of gastro intestinal bleeding and that the accident was the cause effect of his death.

**Held**: (1) there was evidence to support the conclusion of the learned trial judge in accepting the findings of the expert and she had not made any wrong inferences;

(2) the damages of $20,000 for pain and suffering assessed in this case under section 8 of the Civil Law Act, 1956, should be taken into account in the assessment of damages under section 7 of the Act. This meant that the plaintiffs should be awarded $32,000 only under sections 7 and 8 apart from the special damages of $1,850.

*Cases referred to:*

(1) *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.
(2) *Andrews* v. *Freeborough* [1966] 2 All E.R. 721.
(3) *Tan Chooi Thin & Anor.* v. *Teo Whee Hong* [1953] M.L.J. 203.
(4) *Lok Yin* v. *Pat Thoo* [1948] M.L.J. 26.
(5) *Feay* v. *Barnwell* [1938] 1 All E.R. 31.

SUPREME COURT.

*Khoo Eng Chin* (*A. K.J. D'Cruz* with him) for the appellant.

*R. K. Nathan* for the respondents.

*Cur. Adv. Vult.*

**Wan Hamzah S.C.J.** (delivering the Judgment of the Court): On August 5, 1977, Subramaniam s/o Muniandy (hereafter referred to as the deceased) was riding a motorcycle when it collided with a car driven by the appellant, as the result of which he suffered some injuries.

On July 31, 1978, he filed a claim in the High Court for damages against the appellant for negligence. On March 23, 1980, he died. His Writ and Statement of Claim were amended so that his